NO. 83 - 1770

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In the Supreme Court of the United States

OCTOBER TERM, 1983

DELTA MARINE CONTRACTORS, INC.

APPELLANT, PETITIONER

VERSUS

AVONDALE SHIPYARDS, INC.

APPELLEE, RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA, OR ALTERNATIVELY PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA AND THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the only time a government prime contractor can recover from the government any portion of a claim for equitable contract price adjustments which includes a subcontractor claim is when the prime contractor represents that it has paid the subcontractor or has a legal liability to pay the subcontractor in the future.

2. Whether a government prime contractor can refuse to pay in good faith an equitable contract price adjustment to a subcontractor for delays and disruptions by the government when the prime contractor has utilized the subcontractor's claims in making its own claims to the government pursuant to 10 U.S.C. 2306 (f).

3. Whether the subcontractor should receive an equitable adjustment in its contract price from a government prime contractor (1) in the full amount of the subcontractor's claim submitted by the prime contractor to the government or (2) should the equitable adjustment be the same percentage received by the prime contractor on its claims from the government, or (3) should the subcontractor be only awarded an arbitrary portion of its claim.

4. Whether a government prime contractor's refusal to negotiate an equitable contract price adjustment in good faith is justification for the subcontractor to refuse to complete its portion of the government contract.

PARTIES

The caption includes all parties.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions	2
Statement of the Case	4
The Question is Substantial	9
Conclusion	11
Appendix A	A-1
Appendix B	A-4
Appendix C	A-5
Appendix D	A-21

TABLE OF AUTHORITIES

Cases: **Page**

J. L. Simmons Co. v. United States,
158 Ct.Cl. 393, 304 F.2d 886 (1962) 10

Severin v. United States,
99 Ct.Cl. 435 (1943), *cert. den.*,
322 U.S. 733 (1944) 9

United States v. Blair,
321 U.S. 730 (1944) 10

Statute:

10 U.S.C. 2306(f) 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DELTA MARINE CONTRACTORS, INC.

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VERSUS

AVONDALE SHIPYARDS, INC.

APPELLEE, RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA, OR ALTERNATIVELY PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA AND THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Civil District Court for the Parish of Orleans, State of Louisiana; Court of Appeal, Fourth Circuit, State of Louisiana; and the Supreme Court of the State of Louisiana are not reported but are contained in the appendix.

JURISDICTION

This is a proceeding by a subcontractor against a

government contractor for contract price modifications due to government responsible delays and disruptions. It involves the interpretation of armed forces contract modifications with civilian contractors and the binding effect of 10 U.S.C. 2306(f) on prime contractors. The prime contractor submitted claims on behalf of the subcontractor to the government but refused to negotiate in good faith with the subcontractor while receiving compensation from the government and denied it was bound by its subcontractor claims submissions to the government. The district court rendered judgment on June 10, 1980 denying the subcontractor's claims. The state court of appeal rendered judgment on September 2, 1983, amending the district court judgment. On November 22, 1983, the court of appeal denied the granting of a rehearing and on January 27, 1984, the Supreme Court of Louisiana denied writs of certiorari or review. A notice of appeal to this court was filed on April 23, 1984. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (1)(3).

STATUTORY PROVISIONS

10 U.S.C. 2306(f) provides:

> (f)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current—
>
> > (A) prior to the award of any negotiated prime contract under this title where the price is expected to exceed $500,000.00;
> >
> > (B) prior to the pricing of any contract

change or modification for which the price adjustment is expected to exceed $500,000.00, or such lesser amount as may be prescribed by the head of the agency;

(C) prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $500,000.00; or

(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), for which the price adjustment is expected to exceed $500,000, or such lesser amount as may be prescribed by the head of the agency.

(2) Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent: Provided, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may

be waived and states in writing his reasons for such determination.

(3) For the purpose of evaluating the accuracy, completeness,a nd currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

This provision was amended in 1981 to increase the modification amount from $100,000 to $500,000.

STATEMENT OF THE CASE

1. This case involves a U.S. Navy shipbuilding contract. In 1966 the U.S. Navy contracted with Avondale Shipyards, Inc. to construct 27 destroyer escorts. Avondale in turn subcontracted out a portion of this work to Appellant, Delta Marine Contractors, Inc. in 1966 through 1970 basically under contracts for the first seven ships and then the final twenty vessels. The construction program was delayed and disrupted for over two years due to government responsible delays. Avondale submitted contract price modifications pursuant to 10 U.S.C. 2306(f) and negotiated a settlement of $80,000.00 with the government. This increased payment was paid over the course of the contract by provisional payments from June of 1968 through June of 1975.

Avondale submitted claims of $923,379.00 by Appellant to the Navy during this same period and they were submitted pursuant to 10 U.S.C. 2306(f). Avondale, in its final claims submissions, took out specific dollar amounts for subcontractors and negotiated with the government on the basis of an average ship. Nevertheless, Avondale recieved the provisional payments from the government but refused to pay Delta Marine. Delta Marine refused to complete its contract because Avondale would not pay or acknowledge Delta's prior claims and the present litigation ensued.

2. This somewhat lengthy case was judicially commenced on July 28, 1971. At that time Avondale Shipyards, Inc. filed a petition for possession, specific performance, return of overpayments, sequestration, damages, declaratory relief and alternatively injunctive relief. The petition asserted that it had been awarded a contract by the Navy to construct twenty destroyer escort vessels, and that it in turn awarded two purchse order subcontracts to Delta Marine Contractors, Inc., specifically purchase order 5513 calling for the fabrication, delivery, and installation of specified stowage fixtures and purchase order 5717 calling for the furnishing and delivery of specified metal joiner doors. The petition asserted a contractual lien on the material and equipment Delta was to supply Avondale represented by payment Avondale had made to Delta. Thereafter a writ of sequestration was issued and executed.

The petition also asserted that Delta and Avondale agreed on May 28, 1971 that Delta would deliver all fabricated items within three months of that date and that Delta would not comply with that agreement. It also asserted that Avondale had substantially paid for the

fabricated items and was entitled to possession of the items. It also asserted that Avondale overpaid Delta $14,000 on Delta's claim for business interruptions and claims that it overpaid Delta $205,834.58 on the installation portion of the purchase order that was mutually cancelled. Avondale further asserted that it was entitled to damages for the amount it had to pay over and above the contract price for installation plus damages for transportation and business interruptions.

During the execution of the writ of sequestration, on August 13, 1971, Delta Marine filed an answer and reconventional demand, which asserted that it was Avondale who breached the parties' agreements by changing the delivery and installation dates on all twenty seven vessels, misleading Delta relative to its claims for equitable price adjustments due to delays and interruptions, failing to properly and timely pay Delta invoices, wrongfully seizing Delta's premises, and failing to pay Delta's equitable adjustment claim resulting from a two year delay. Delta asserted that it was damaged in the amount of $9,145,000 as a result of Avondale's breach and wrongful seizure.

Avondale filed an exception of no right or cause of action and vagueness to Delta's reconventional demand. Thereafter, on January 21, 1974, Delta amended its reconventional demand to specify damages for loss of future profits in the amount of $7,729,762.00.

On November 22, 1974, the matter was assigned to Commissioner C. L. Rivet.

On July 30, 1976, Delta amended its answer further asserting that it had not been paid by Avondale and Avondale was not entitled to the items it had seized. It further

amended its reconventional demand and asserted that Avondale only questioned Delta's equitable adjustment claim after Avondale became aware that Delta was going to seek relief in court, and further claimed $50,999.35 was due Delta on unpaid invoices for purchase orders 5513, 5717 and purchase order LA 1162, a separate purchase order relating to construction of a LASH vessel.

The amended reconventional demand also claimed that Delta had submitted to Avondale a claim for equitable adjustment in the amount of $923,379.38 which Avondale had incorporated in its claim to the Navy. The petition revised the claim in the amount $3,234,159.00 plus interest of $1,063.29 daily. Thereafter Delta's principal claim was for $50,999.35 in unpaid invoices, $3,234,159.00 in equitable adjustments due to delays and disruptions, and $7,954,740.00 in damages for wrongful seizure.

On August 13, 1976, Avondale filed exceptions of no right or cause of action to Delta's reconventional demand. The exceptions were referred to the merits and on September 3, 1976, and September 9, 1976, Avondale filed answers to Delta's reconventional demand as amended. The answer reurged its exceptions, generally denied the allegations and pled a set off to the reconventional demand in the amount of $1,054,086.41 allegedly reflected in Avondale "M" jobs to complete Delta's work, $638,628.00 in alleged overpayments to Delta, and $18,000.00 in overpayment of Delta's equitable adjustment claim.

Thereafter this matter came on for trial on December 5, 1977, before Commissioner Anthony Vesich, Jr. The case was tried for one week and then continued until March 13, 1978, due to illness of the Commissioner. The trial was concluded on April 21, 1978.

On August 28, 1979, the Commissioner rendered his report dismissing Delta's reconventional demand and awarding Avondale $137,925.19 in damages on Purchase Order 5513, $136,609.39 on Purchase Order 5717, and $18,571.36 for warehousing and handling Delta's material.

Delta filed exceptions to the Commissioner's report and on June 16, 1980, the Commissioner's report was upheld and Judgment signed accordingly.

Delta timely appealed to the Fourth Circuit Court of Appeal for the State of Louisiana. The Court of Appeal rendered judgment on September 2, 1983, and amended the judgment of the lower court.

The Court of Appeal held that Delta was entitled to an equitable contract adjustment as well as the balance due on other contract claims. The appellate court used these amounts as an offset against Avondale's completion costs. Delta timely applied for a rehearing which was denied on November 22, 19183.

Delta applied for writs of certiorari or review to the Supreme Court of Louisiana, which were denied on January 27, 1984. Delta has timely filed this appeal.

3. The questions concerning the legal effect of 10 U.S.C. 2306(f) were raised at each stage of the proceeding and briefed at each stage of the proceeding. The District Court held that Avondale's claims submissions which included the subcontractor claims were not endorsements but rather constituted assistance only. The Court of Appeal held that the claim submissions were endorsements of the subcontractor's claims, but not as to the amount of the claims. The Court of Appeal also held that even though

Avondale did not act in good faith in resolving either of the seven ship or twenty ship subcontractor claims of Delta Marine, Delta was not entitled to cease work because delays and disruptions were contemplated by the contract. The Court of Appeal then awarded Delta only twenty-five per cent of a portion of its claims and ten per cent of another portion of its claim and offset those entire amounts by awarding to Avondale its costs to complete after Delta ceased work. On its application for rehearing and applications for writs of certiorari or review to the Supreme Court of Louisiana, Delta argued that a prime contractor could not include subcontractor claims under 10 U.S.C. 2306(f) unless the prime contractor had paid or had a liability to pay the subcontractor in the future—specifically, Delta's claims of $923,379.00 which were originally submitted to the government and pursuant to which Avondale received provisional payments. The request for rehearing was denied by the Court of Appeal and the Louisiana Supreme Court denied the writ application.

THE QUESTION IS SUBSTANTIAL

The ruling by the Louisiana Court of Appeal and writ denial by the Louisiana Supreme Court forges a new and inconsistent interpretation on the "Severin Doctrine" which will affect all subcontractors in their contractual relationship with a government prime contractor. The "Severin Doctrine" held that the government had no liability to a prime contractor for claims of its subcontractor if the prime contractor had no independent liability to the subcontractor. *Severin v. United States*, 99 Ct.Cl. 435 (1943), *cert. denied*, 322 U.S. 733, 64 S.Ct. 1045, 88 L.Ed. 1567 (1944).

Conversely, the only time a prime contractor may

recover from the government, the claims of a subcontractor, is when the prime contractor has in fact reimbursed the subcontractor or remains liable for such reimbursement in the future. *J. L. Simmons Co. v. United States,* 158 Ct.Cl. 393, 304 F.2d 886 (1962). That procedure is a common method for prime contractors to recover their increased costs due to government caused delays and disruptions. *United States v. Blair,* 321 U.S. 730, 64 S.Ct. 820, 88 L.Ed. 1039 (1944).

However, if pursuant to 10 U.S.C. 2306(f), a prime contractor submits cost and pricing data to the government and includes subcontractors' claims, either by amount or content, then receives additional compensation from the government, and then refuses to pay the subcontractor's claim, the purpose of 10 U.S.C. 2306(f) is defeated.

This course of conduct allows a government prime contractor to recover money for contract modifications and refuse to act in good faith in passing through the subcontractor's portion. The result creates uncertainty in any government subcontractor and will defeat its desire to perform on any government project. The end result is that the prime contractor benefits to the detriment of the subcontractor.

The necessary interpretation of 10 U.S.C. 2306(f) requires that when a prime contractor submits claims or price modification on behalf of a subcontractor to the government that it does legally represent that it has paid or will pay the subcontractor the amounts submitted consistent with *J. L. Simmons Company, Inc., supra.* The duty of a prime contractor towards a subcontractor should be the same whether the prime contractor proceeds against the government through a law suit or through compromise negotiations.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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Attorney at Law

APPENDIX "A"

IN THE SUPREME COURT OF THE
STATE OF LOUISIANA

AVONDALE SHIPYARDS, INC. No. 83-C-2570
Appellee

VERSUS

DELTA MARINE CONTRACTORS, INC.
Appellant

COURT OF APPEAL—FOURTH CIRCUIT
STATE OF LOUISIANA

NO. 12355

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, OR ALTERNATIVELY PETITION FOR A WRIT OF CERTIORARI

Notice is hereby given that Delta Marine Contractors, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Louisiana Supreme Court entered on January 27, 1984 denying writs of certiorari or review to the Fourth Circuit Court of Appeal Number 12355.

This appeal is taken pursuant to 28 U.S.C. § 1257 (1)(3).

TUCKER & SCHONEKAS

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CERTIFICATE OF SERVICE

I, Russell J. Schonekas, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served a copy of this Notice of Appeal on counsel of record set out below by depositing a copy of this notice in the U.S. Mail with first class postage prepaid and addressed to:

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That this notice was in fact mailed on the 23rd day of April, 1984.

/S/Russell J. Schonekas
RUSSELL J. SCHONEKAS
Attorney for
Delta Marine Contractors, Inc.

FILED
April 23, 1984
Civil District Court

Court of Appeal
Fourth Circuit

Clerk's Office
Supreme Court of Louisiana

APPENDIX "B"

THE SUPREME COURT OF THE
STATE OF LOUISIANA

AVONDALE SHIPYARDS, INC.

VS NUMBER 83-C-2570

DELTA MARINE CONTRACTORS, INC.

In Re: DELTA MARINE CONTRACTORS, INC., applying for writ of Certiorari and/or Review to the Fourth Circuit Court of Appeal, Number 12355; Civil District Court, Parish of Orleans, Number 527-633 Division "G"

January 27, 1984

Denied.

WFM
JAD
PFC
JLD
FAB
JCW
HTL

Supreme Court of Louisiana
January 27, 1984

/S/Signed
Clerk of Court
For the Court

APPENDIX "C"

NO. 12355

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

AVONDALE SHIPYARDS, INC.

VERSUS

DELTA MARINE CONTRACTORS, INC.

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
HONORABLE STEPHEN R. PLOTKIN, JUDGE
DIVISION "G", NO. 527-633

WILLIAM V. REDMANN
CHIEF JUDGE

(Court composed of Chief Judge William V. Redmann, and Judges Philip C. Ciaccio and Patrick M. Schott)

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EDWARD J. KOEHL, JR.
Jones, Walker, Waechter,
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FOR DELTA MARINE CONTRACTORS, INC.

AMENDED.

Delta Marine Contractors, Inc. appeals from a judgment in favor of Avondale Shipyards for $270,215.84 damages for breach of two Navy shipbuilding subcontractors. Delta contends that breaches by Avondale caused Delta's noncompletion of its contracts. But the primary contention of Delta's reconventional demand is that, in any case, Avondale owes Delta $4,000,000 in price adjustments under these and similar contracts on Navy ships and $7,000,000 damages for a judicial sequestration that put Delta out of business. Delta further contends that Avondale did not prove the costs of completion awarded on the two contracts Avondale sued on.

We conclude that Avondale did prove its cost of completion, although the correct measure of damages is not cost but excess cost of completion; that equitable adjustments in Delta's prices were represented by Avondale to the Navy to be due in amounts so far in excess of Avondale's $50,000 provisional payment that Avondale must be held to owe further equitable adjustments notwithstanding

that Delta's deficient financial records prevent a mathematical approximation of equitable adjustments; that Delta did not prove that Avondale caused Delta's breach of contract; and that Avondale's judicial seizure was not unlawful (and was in any case not the cause of Delta's destruction).

Avondale had contracts with the Navy to build first seven and then 20 more ocean escorts. Avondale subcontracted some parts of that work to Delta by "purchase orders" for fabrication alone or fabrication and installation of items such as doors and stowage fixtures.

Whether caused entirely by the Navy or in part by Avondale (as, possibly, by its need to "rebuild" two hurricane-damaged vessels it had under construction), delays of about two years occurred in the building of the ships, and these delays allegedly affected Delta by a variety of increased costs for which it requested but, save for a $50,000 advance by Avondale for "business interruption," did not obtain equitable adjustment as authorized by the purchase orders and the general Navy contract. Meanwhile, Delta billed Avondale for progress payments not on the basis of percentage of completion (but not over cost plus 5%) as agreed and as recited in the billings, but instead on a basis related to Delta's cash expenditures, including expenditures unrelated to the Avondale purchase orders. One consequence of those two factors, precipitated by Delta's insistence on an agreement for storage charges, was that the remaining installation portion of the 20-ship stowage fixtures purchase order was canceled. (Avondale deemed the storage charges high and preferred itself to store the fabricated items; Delta believed its own installation costs would be thereby increased and Avondale believed Delta could not do the installation for the price assigned

to it anyway.) Another consequence was that Delta became unable to complete the final portion of the two larges orders and notified Avondale of its intent to cease operations and sell everything it had, including all work in progress.

Avondale then judicially sequestered (and later bonded out and used) the work in progress and the material Delta had for the Avondale orders. (Delta charges the seizure went beyond those items.) Avondale itself completed the fabrication.

Avondale's sequestration action also asked reimbursement of progress payment overbillings, return of $14,000 of its $50,000 provisional advance, and damages caused by Delta's breach, including costs of the transportation of the sequestered items to Avondale.

Delta's reconventional demand alleged that Avondale, rather than Delta, breached their contracts first by delays and by refusal to afford equitable adjustment for the increased costs caused by the delays, and finally by the judicial seizure that Delta claims destroyed Delta as a business entity.

The trial court commissioner, in a 63-page report, recommended a judgment for Avondale for $270,215.84, as Avondale's cost (sic) of completion of the Delta purchase orders (save installation but including $18,571.36 cost of transporting and warehousing the items sequestered from Delta). The trial court judge noted "difficulty in determining whether the Delta Marine claims for adjustment due to delays and disruption by the U.S. Navy were included in Avondale's claim submission and settlement with the Navy," but he "affirmed" the "Judgment of the Commissioner."

We preliminarily observe that if Delta was entitled to recover its government-caused delay losses from Avondale who in turn was to recover from the Navy, Avondale's failure to recoup those losses from the Navy does not preclude Delta's recovery from Avondale. But we also observe that, to be entitled to recover from Avondale, Delta had to present its claims in time for Avondale to present them to the Navy for reimbursement. Delta did timely present its claims in the amounts of $199,565 and $645,557; but Delta did not timely present its $4,000,000 upward revision of those claims. That upward revision was not claimed until the reconventional demand in this lawsuit. (And it is clear that most if not all of these claims are for Navy delay despite the contention that Avondale itself engaged in delay to force concessions from the Navy.) We therefore do not consider the upward revision of Delta's claims notwithstanding that Delta's brief argues this upward revision at great length.

We further observe that the basic damages for breach of a contract are not cost of completion but the excess cost of completion (as even the contracts' General Requirement 34b specified), and it is therefore irrelevant to the basic *measure* of damages that Delta's progress payment billings exceeded their rightful amount. The basic measure of damages is excess of total actual cost over contract price, and total actual cost is composed of all progress payments (whether correctly calculated or not) plus the cost of completion. To put it another way, had the progress payments been less by a given number of dollars, Avondale would have owed that number of dollars more to Delta to complete the job, and therefore the difference between the amount Avondale should have paid to Delta to complete the contracts and the amount Avondale in fact paid to complete the job itself—the *excess* cost of completion—would

be smaller by that same number of dollars. We therefore do not detail Delta's overbillings although a large portion of record and briefs consists of evidence and argument on overbillings. (Although overbillings are in themselves a violation of the contract terms, Avondale did not claim nor establish the amount of interest arguably due because of early payment, nor any set-off from late payment; and we presume this possible element of damage was abandoned by Avondale as minimal.)

Delta breached the contracts that Avondale sued on (relative to the 20-ship contract) by failing to complete them (because of financial inability) and threatening instead to sell the fabricated items and materials it held. The federal contractual agreement gave Avondale a lien if not title to those things. Avondale's sequestration was not proved to be excessive and, perhaps more determinative of Delta's claim on this point, was not the cause of Delta's destruction as a business, for Delta had previously notified Avondale that it was ceasing all operations and selling all its assets.

Furthermore, Avondale did not by its own breach of those contracts cause Delta's failure to complete its performance. Avondale's delay to accept delivery of fabricated items was anticipated and permissible under the contracts' General Requirement 22 (although Delta was entitled to a price adjustment for costs occasioned by such a delay). Avondale's delay in payment, especially of delta's late 1970 billings, was not shown to be a breach of those contracts, because Delta's earlier billings were in excess of the agreed limitation of monthly billings to costs plus 5%, by paying the earlier billings Avondale had apparently already paid Delta more than Delta was entitled to. Avondale did owe Delta some price adjustment, but Delta could at all times

have recovered its actual costs plus 5% by monthly billings (and the other contractual limit, percentage of comopletion times price, in fact would not have been reached). Delta was not entitled to bill any more than that (because cost plus 5% was a contractual limit on monthly billings). So Delta had no contractual right to payment of any price adjustment on *those* contracts until after its own performance was completed (except to the extent monthly costs plus 5% would have totaled more than the unadjusted price, a possibilitly that did not in fact occur). Thus no breach of those contracts by Avondale was proven to have caused Delta's breach of those contracts, and Avondale is therefore entitled to damages. (The evidence suggests that the funds that Delta received from Avondale were quite adequate for Delta to have completed the contracts. In fact Delta funneled about $1,000,000 into an unsuccessful business project unrelated to the Avondale contracts, and that money came very largely from the Avondale contracts, the bulk in value of which was constituted by the two sued upon. It appears likely that Delta would have survived and prospered if it had merely abided the cost plus 5% billings limit, and had not engaged in its disastrous side venture.)

Avondale did breach earlier contracts with Delta (relative to the seven-ship contract) in the sense of not having "performed with good faith," La.C.C. 1901, its obligation to "agree upon such adjustments in the...price...as will equitably compensate [Delta] for the increased cost incurred" from suspension. Equitable adjustments were subject to Navy approval, but Avondale did obtain from the Navy a provisional adjustment of the whole seven-ship contravt of over $18,000,000 in response to Avondale's total claim of $49,255,202, which expressly included $199,565 claimed by Delta, and Avondale's lump-sum settlements with the

Navy expressly included all subcontractors' claims and therefore waived any requirement of express Navy approval. Notwithstanding that Avondale's final claim did not expressly include any dollar amount claimed by Delta (or any other subcontractor), nor that the final settlement of the seven-ship claim of $17,034,507 (of $80,000,000 for both 7- and 20-ship contracts) was less than the provisional adjustment, we conclude—especially in view of Avondale's written representations to the Navy that Delta had suffered losses from Navy-caused delays—that Delta was entitled to equitable adjustment on its portions of the seven-ship contract substantially greater than, say, 7/27ths of the $50,000 total for both 7- and 20-ship contracts advanced by Avondale.

Avondale's and the trial court's positions are not incomprehensible because Delta's billing practices made its accounting suspect and, moreover, its supporting records were lost or destroyed to such an extent that a solid accounting verification of delay costs is not possible. And, for many obvious reasons, Delta's added costs of fabrication of doors and fabrication and installation of stowage fixtures are not necessarily proportional to Avondale's added costs for whole-ship fabrication. Furthermore, Avondale's own claim included substantial, unpriced change orders. There is thus no support for a conclusion that Avondale's receiving a certain percentage price adjustment on the whole contract proves that Delta should receive the same percentage adjustment, or even that Delta should receive the same percentage of its claim that Avondale received of its claim. Nevertheless, as Avondale's own claim letters to the Navy asserted, Delta did suffer to some extent from the Navy-caused delays, and the contracts entitled Delta to an equitable adjustment in price.

The trial court's failure to make any additional adjustment was due to its view that supportive evidence was lacking. Yet, in addition to Delta's extensive accounting projection, very supportive of Delta's 7-ship claims is Avondale's August 28, 1970 letter to the Navy, written when Delta's 7-ship work was largely complete. That letter is not a mere transmittal of Delta's claim to the Navy, for it declares "Avondale has reviewed the subcontractor's claim and comments as follows:...." There follows in large part a recommendation that the Delta claims be honored (although never for any specific dollar amount). We say "in large part" because, as to two of the six categories of claims, that Avondale letter advised the Navy "Avondale can find no direct relationship between the subcontractor's additional costs and direct Government responsibility." As to the other four categories, Avondale's letter commented in part:

> "1. *Interruptions and Delays in Installation*
> [Delta] claims $124,813.70....The disruption suffered by Delta parallels the disruption suffered by both Todd shipyards and Avondale as a result of the cumulative effect of all the government actions....
>
> "2. *Non-Standardization of Drawings*
> [Delta] claims $9,815.60....[Delta] bid...on the basis of the specification requirements which define the stowages to be in accordance with standard BuShips drawings....The extremely crowded nature of the ship inherent in the Government's design made the standardization of stowages impossible, and [Delta] has been subjected to the increased costs of customized stowage....
>
> "3. *Changes in Cylinder Stowage Requirements*
> Delta claims $2,310.11....The Government is

responsible for the additional costs....

"6. *Warehousing*

[Delta] claims $57,336.75....[Delta] is entitled to the additional costs of warehousing caused by the Government-responsible delay."

Those words are words of endorsement by Avondale of those parts of Delta's claim, although not necessarily of their specific dollar amounts. A court of law can not allow Avondale to tell the government that the government should pay Avondale for Delta's claim (plus 13.2% for Avondale's profit) but then, after settling all claims with the government, tell Delta that Delta's claim is almost worthless. Avondale cannot now make that assertion, unless Avondale can either explain away its endorsement of Delta's claim to the government or can show that the government expressly rejected the Delta claim. Avondale officers did testify that government auditors "had issued a non-favorable report" on the Delta claim; yet Avondale refused to give Delta any written auditors' report to support that assertion, and did not produce it at trial. Avondale did show that the final form of its claim submission to the Navy did not expressly include any dollar amounts of any subcontractors' claims, but that does not overcome Avondale's earlier endorsement. If Avondale's "review" of Delta's claim satisfied Avondale that four of its six elements merited some payment by the government, that review should certainly have satisfied Avondale that it owed Delta some substantial agreement for equitable adjustment.

The Avondale letter-endorsement was not for the specific dollar amounts. Yet, just as Avondale rightly recognized the obligation to advise the Navy that two

elements of Delta's claim seemed unjustified, Avondale should equally have recognized an obligation to advise the Navy that the other four elements were exorbitantly overstated, if indeed that was Avondale's view. Avondale's failure to so advise the Navy is not the equivalent of accepting those elements' dollar amounts, but in the context of equitable adjustment we deem the Avondale endorsement to estop Avondale from denying that some significant part of those elements is due.

We tend towards the view that a knowledgeable general contractor, itself entitled to similar equitable adjustments from the same causes, would ordinarily spot a subcontractor's 100% or more overstatement of a claim for equitable adjustment, and would therefore not include such a claim in its own submission without some indication to the government in its "review and comment" of that subcontractor's claim. Such a knowledgeable general contractor is presumably capable of making an educated estimate of the value of the subcontractor's claim, at least within a broad margin of error.

> "[T]here is an element of estimating in almost all equitable adjustments and there should be no question that estimates by knowledgeable people are relevant proof of the amount of a claim....
>
> "At the level of the contracting parties, there is usually great awareness that estimates of the various elements of cost involved in equitable adjustment are the normal form of information which must be used to conclude the negotiation." Nash, Government Contract Changes, 441-442.

Actual cost data is more probative than estimates, but in some cases "the boards and courts have recognized

the difficulty a smaller contractor faces in keeping detailed records of actual costs and have excused the lack of such records." *Id.*, 443. And, although in most cases appeals boards, like government contracting officers, analyze claims on an item-by-item basis.

> "In some cases, appeals boards use a much broader approach in arriving at the amount of the adjustment. When the data available and the testimony is highly complex, the appeals board will occasionally render a true jury verdict—an award of a dollar amount without any description or analysis of the elements of the adjustment. In such cases the boards weigh all of the evidence presented to them and reach a judgmental decision. These decisions are generally not in the amount requested by the contractor but are at a significantly lower figure. This reflects the caution exhibited by the appeals boards when faced with the lack of concrete costs and estimating techniques on which to base their decisions.
>
> "Another technique that is used with some regularity is the granting of a jury verdict at a percentage of the 'total cost' amount requested by the contractor....There are a number of cases where the appeals boards have rejected the 'total cost' approach but have also felt that it was unfair to give the contractor no adjustment at all. In these cases, the boards have stated that they are using the jury verdict approach to give a portion of the total cost claim. Percentages of 30%, 33⅓%, 50% and 68% have been used in this manner. Usually this is done when, in considering one portion of a contractor's claim, there is no proof of actual costs but the total cost presentation can be related to that portion of the claim. This is a good example of the willingness of the appeals boards to grant some relief in spite of the inability

> of the contractor to present evidence of the costs that were incurred as a result of the change." *Id.*, 446.

Avondale's own lump-sum settlement of $80,000,000 on its $169,000,000 claim may itself have been in the nature of a "jury verdict" award, for it is conceded that it was not an item-by-item award and that no specific dollar amount was attributed to any element of Avondale's overall claim.

Especially in view of Avondale's endorsement of most of Delta's 7-ship claim, considered in light of Avondale's own familiarity with delay costs on this project, we deem it plain that Avondale's contract at least obliged it to reach some "jury verdict" type of agreement with Delta for an equitable adjustment. We cannot fault Avondale's letter's rejection of two of the six described elements of this claim as not attributable to government delays. But the remaining four elements, totalling $194,276.16 (ignoring Delta's later increases, never timely submitted to Avondale), were endorsed by Avondale to the Navy (though not as to dollar amount), and should have produced a substantial equitable adjustment.

The $50,000 provisional adjustment that Avondale advanced for Delta's "business interruption" was for both 7- and 20-ship claims, for which Delta's claims (including the 1971 reduction of the 20-ship claim) totaled about $865,000. Proration of the $50,000 over the 27 ships would mean that less than $13,000 of the $50,000 is attributable to Delta's 7-ship claim, of which $194,276.16 was endorsed (though not specifically as to amount) by Avondale to the Navy. That seems far too little as an equitable adjustment.

We conclude that any performance "with good faith," La. C.C. 1901, of Avondale's contractual obligation to agree with Delta upon equitable adjustment, under all the circumstances, could not have resulted in an equitable adjustment of less than a fourth of that $194,276.16. We would therefore allow Delta a "jury verdict" credit of $48,569.04 on its 7-ship claim. (We here note our rejection of Avondale's construction of a January 14, 1969 agreement to oblige Delta to provide warehousing of fabricated items indefinitely without charge until Avondale needed them; the August 1970 letter's recommendation that the Navy pay Delta's warehousing during the delay is wholly irreconcilable with such a construction.)

Delta's claims on the 20-ship contracts also have some justification in the government-caused delays, and to some extent they have a general endorsement by Avondale in another letter of August 28, 1970. But Delta itself reduced its $723,814.33 claim by about 11% to $645,557 in June 1971 because of the partial cancellation of the installation portion, and the first element of this claim, labor rate escalation ($26,400), related to installation labor, eliminating, we estimate, about 80% of that element. The extended commitment element ($330,525) was not commented on by Avondale "as it is subject to audit." As to the loss of efficiency element ($129,514), Avondale commented to the Navy only concerning $58,870 of (non-installation) labor, saying that that amount "represents a relatively small percentage of the total labor value....Other participants...have suffered larger percentages of inefficiency." The non-standardization of drawings ($26,438.72) and the warehousing ($210,936.61) elements received the same favorable Avondale comment quoted above for the 7-ship claim. (Avondale itself received, of its $80,000,000 settlement, $62,965,493 attributed to the 20-ship contract,

on which it had claimed a total of about $120,000,000.) We deem that Avondale letter an endorsement to the Navy of about $5,280 (20%) of the $26,400 labor rate escalation, $58,870 for loss of efficiency (without rejecting the balance of that element), and $26,438.72 plus $210,936.61 for the last two elements (without rejecting the $330,525 extended commitment element "subject to audit"), or a total of $301,525.33 (although not specifically as to amount), which must be reduced by Delta's June 1971 reduction of 11% to $268,357.54. As we did in the 7-ship claim, we conclude that a good faith equitable adjustment could not have been less than a fourth of those endorsed amounts, or $67,089.39. We further believe that as to the non-rejected items of $330,525 and $70,644 (loss of efficiency other than labor), at least 10% of 89% (100% reduced by 11%), or $35,704.04, would have been a minimal equitable adjustment on Delta's 20-ship claim.

As a final offset, we allow the uncontradicted $8,382.65 balance that Avondale owes Delta on an unrelated $195,250 LASH spools order.

But Delta's appeal also complains of the trial court's use of Avondale's accounting of its cost of completion on several grounds. We conclude that Avondale's testimony and records support the trial court's finding that transportation of goods from Delta to Avondale and completion of fabrication cost Avondale $270,815.84 (including overhead and profit). Only excess cost of completion is recoverable as damages, however. From the cost of completion there would have to be deducted any balance due on the adjusted contract price, including the equitable adjustment (less some part of the $50,000 provisional advance Avondale made).

The prices of the two 20-ship contracts Avondale sued on, including change orders, were $2,318,451 and $563,260, a total of $2,881,711, less the partial cancellation of installation, evaluated by Delta at the time at $189,061.52. That Delta evaluation was never expressly agreed to by Avondale, but it is consistent with the basic installation charge of $13,000 for each of 20 ships, and it is not contradicted by Avondale's evidence. We fix those two contracts' prices at $2,692,649.48 (not yet equitably adjusted). Of that amount Avondale paid approximately $2,650,032.78 (there are three sets of figures, within $15 of one another), leaving a balance of $42,616.70 that Avondale would have had to pay Delta had Delta completed the fabrication, in addition to any unpaid equitable adjustment.

We have concluded that an equitable adjustment was due of no less than $102,793.43 on those two 20-ship contracts, although part of that must be considered paid by some part of the $50,000 provisional advance Avondale made.

Rather than assign some apportionment of that $50,000 to each of the 7- and 20-ship contracts, we reach an overall net award to Avondale as follows: $270,215.84 cost of completion, minus $42,616.70 due on basic contract prices (including change orders and cancellation), minus $102,793.43 equitable adjustment on the 20-ship contract, minus $48,509.04 equitable adjustment on the 7-ship contract, plus $50,000 provisional advance by Avondale, minus $8,382.65 unpaid on LASH spools, for a final amount of $117,854.02.

The judgment is amended to $117,854.02 plus interest from judicial demand (as awarded by the trial court), with all costs to be divided equally.

APPENDIX "D"

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, Nov. 22, 1983

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

AVONDALE SHIPYARDS, INC.

v.

DELTA MARINE CONTRACTORS, INC.

No. 12355

Very truly yours,

MARJORIE R. CAMBRE, Clerk

APPENDIX "E"

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 527-633 DIVISION "G" DOCKET NO. 4

AVONDALE SHIPYARDS, INC.

VS

DELTA MARINE CONTRACTORS, INC

JUDGMENT

This cause came on January 25, 1980 on exceptions to the Commissioners report filed herein on December 11, 1979; and ws continued for submission of briefs to February 25, 1980; and was further continued for submission of supplemental memorandums, reply memorandums and on memorandums relative to inclusion of Delta in Avondale's claims to the Navy; at which hearing there were present:

Robert B. Acomb, Jr. and Edward J. Koehl, Jr—Attorneys for Avondale Shipyards

James E. Stovall—Attorney for Delta Marine Contractors, Inc.

WHEN, after hearing the pleadings and argument of counsel and after reviewing the Court record, including the briefs of counsel and the written findings of the Commissioner; and for the written reasons assigned herein:

IT IS ORDERED, ADJUDGED AND DECREED that the findings of Commissioner Anthony J. Vesich, Jr. be and they are hereby approved and accordingly; there be judgment herein in favor of the plaintiff Avondale Shipyards, Inc., and against the defendant Delta Marine Contractors, Inc., on the main demand, in the full sum of $270,215.84, together with legal interest from date of judicial demand until paid.

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 527-633 DIVISION "G" DOCKET NO. 4

AVONDALE SHIPYARDS, INC.

VS

DELTA MARINE CONTRACTORS, INC

REASONS FOR JUDGMENT

This Court has reviewed the report of the Commissioner dated August 28, 1979 and the extensive memorandums filed by the parties and overrules the exceptions filed by Delta Marine Contractors, Inc., plaintiffs in reconvention and defendants in main demand.

The Commissioners findings of fact and conclusions of law are justified. However, this Court experienced difficulty in determining whether the Delta Marine claims for adjustment due to delays and disruption by the U. S. Navy were included in Avondales claim submission and settlement with the Navy. The Commissioner concluded that neither the final claim settlement nor the provisional

payments received by Avondale included any money paid by the Navy on account of Delta Marines claim and I do not find that conclusion to be manifestly erroneous.

The Judgment of the Commissioner will be affirmed.

New Orleans, Louisiana
June 16, 1980

/S/Signed
JUDGE

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant in reconvention Avondale Shipyards, Inc., and against plaintiff in reconvention Delta Marine Contractors, Inc., dismissing the demand of Delta Marine Contractors, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Delta Marine Contractors, Inc. bear all costs of these proceedings.

JUDGMENT signed this 16th day of June 1980.

/S/Signed
JUDGE